APPEAL NO. 93449

On April 28, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the respondent (claimant herein) sustained an injury in the course and scope of his employment on (date of injury); that the claimant has had disability since January 11, 1993; and that the claimant was not terminated for cause by the employer. The hearing officer ordered the appellant (carrier herein) to pay temporary income benefits and medical benefits to the claimant in accordance with the provisions of the 1989 Act. The carrier requests that we reverse the decision of the hearing officer and render a decision that the claimant was not injured in the course and scope of his employment; that he has not had disability; and that he was terminated for cause.

DECISION

Affirmed in part and reversed and rendered in part.

On (date of injury), the claimant worked as a route salesman selling soda for his employer, BBI. He testified that at about 9:30 a.m. on that day he was delivering sodas to a customer when he slipped while carrying two cases of soda out of his employer's truck and did a split with one leg in the truck and the other leg outside of the truck. He immediately felt a sharp pain in his back and about 15 minutes later felt a burning sensation in his stomach. There were no witness to the accident. The claimant said that when he finished his route and returned to his employer's place of business later that morning, he told his manager, (Mr. H), that he had slipped out of the truck and hurt his back and talked to Mr. H about taking off work to see a doctor. The claimant had furniture delivered to his house the afternoon of December 24th after he got off work. However, the claimant denied lifting any furniture and statements of the furniture deliverers and a friend, (MW), who helped move the furniture indicate that no one saw the claimant lift anything other than a small lamp. There is, however, a question as to how a couch and love seat that MW testified were left on the claimant's patio actually got into the claimant's house. MW said in a transcribed recorded statement that he and "the guys" put all of the furniture in the house for the claimant, but at the hearing said the couch and love seat were left on the patio. MW also said in his recorded statement that the claimant asked him for help prior to the furniture being delivered because the claimant said his back hurt. The claimant did not tell MW how he had hurt his back. The claimant was scheduled to be off work and did not work on December 25th, 26th, and 27th. He did work on December 28th and 29th. He was scheduled to work on December 30th but did not because he said he had to get a relative released from jail and his car broke down. He was also scheduled to work on December 31st but did not because "of my stomach and my back." The claimant was scheduled to be off work and did not work on January 1, 2, and 3, 1993.

The claimant said he called his family doctor on December 29th and that the doctor

prescribed medication for his back pain. The claimant was terminated from employment with the employer by Mr. H on January 4, 1993. Mr. H said the reason for the termination was that the claimant had issued insufficient funds checks to several of the employer's customers who were on the claimant's route. The claimant acknowledged that he had issued insufficient funds checks to customers. Mr. H and the claimant's supervisor, (Mr. W), said they had no knowledge or notice of any injury to the claimant at the time the claimant was terminated. They said that they first became aware that the claimant was claiming a work-related injury on January 13, 1993, when the employer received a letter from the claimant indicating he had been hurt on the job on December 24th. After being terminated, the claimant said that he tried to get an appointment with the doctor he had treated with for two previous work-related back injuries, one in 1989 and the other in 1990, while working for other employers. However, that doctor was not available so he was referred to (Dr. W) whom he saw on January 11, 1993. The claimant said he also saw Dr. D and (Dr. P) in January 1993.

The doctors the claimant saw in January 1993 all work at the (Clinic). Clinic records recite that on January 11, 1993, the claimant was examined by Dr. W for complaints of back and leg pain he said he sustained on December 24th when he slipped while delivering crates of soda. He was diagnosed as having "low back pain secondary to slip" and "aggravation of preexisting injury." Dr. W wrote that the claimant could only do light duty with no lifting and recommended pain medication and physical therapy. A CAT scan of the claimant's lumbar spine was said to show no significant change from a previous CAT scan done in 1989. In a patient note dated January 18, 1993, Dr. W indicated that the claimant was not a candidate for back surgery, but recommended that the claimant only do light duty with no lifting and no driving until a follow-up examination could be done. On January 20, 1993, the claimant presented to Dr. W with complaints of umbilical area abdominal discomfort "after lifting heavy object on 12-24-92." The claimant testified that the two cases of soda he was carrying when he slipped on December 24th each contained 24 20-ounce glass bottles of soda. Dr. W diagnosed an umbilical hernia. In a report dated January 20, 1993, Dr. P recommended surgical repair of the claimant's umbilical hernia and scheduled surgery for January 26, 1993. The claimant testified that he has not had surgery because the carrier denied payment for it. Dr. P indicated that the claimant could not return to full duty work, but could return to light duty work. In another report also dated January 20, 1993, Dr. L, who is also with the Clinic, wrote that the claimant could not return to full duty work and gave no indication that the claimant could return to light duty work. The claimant testified that since his injury of December 24th he has been unable to "do anything," and that when he tries to lift anything his stomach gives him a lot of problems. The claimant also testified that if he were able to go to work he would, but that he is "unable to do this."

The hearing officer found that the claimant sustained a lower back injury on (date of injury), while working for the employer which was an aggravation of the claimant's preexisting injury, and further found that the claimant sustained a burning sensation in his

stomach on (date of injury), while working for his employer which was diagnosed as an umbilical hernia. The hearing officer concluded that the claimant sustained an injury in the course and scope of his employment with the employer on (date of injury).

The burden is on the claimant to establish that the injury occurred in the course and scope of his employment. Director, State Employees Workers' Compensation Division v. Bush, 667 S.W.2d 559 (Tex. App.-Dallas 1983, no writ). The question of whether an injury was sustained in the course and scope of employment is ordinarily a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ). Under the 1989 Act, the hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Articles 8308-6.34(e) and (g). When presented with conflicting evidence, as in this case, the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's findings and conclusion that the claimant was injured in the course and scope of his employment and we further conclude that the findings and conclusion of injury in the course and scope of employment are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ); I.N.A. of Texas v. Lackey, 688 S.W.2d 689 (Tex. App.-Beaumont 1985, no writ).

In regard to the issue of whether the claimant was terminated for cause, Mr. H testified that sometime in mid-December 1992 he talked to the claimant about the claimant's issuance of insufficient funds checks to customers on the claimant's route. The claimant acknowledged that such a discussion took place. Mr. W was present at the meeting. The claimant was somewhat vague as to what was said at the meeting but acknowledged that he had written insufficient funds checks to customers and that Mr. H told him about "the fact of it being a bad influence on the way that I looked selling beverages." However, the claimant testified that he did not know at the time of the discussion with Mr. H or at the time of the hearing that it was the policy of the employer for a route salesman not to give insufficient funds checks to customers. The claimant said "I haven't seen it in a rule book," and that Mr. H never told him "about it affecting my job." Mr. H testified that when he talked to the claimant about insufficient funds checks in December 1992, he told the claimant that "it was a bad policy for a route salesman to give a convenience store that he called on a bad check due to him selling the product." Mr. H said that he did not tell the claimant at the December meeting that he would be terminated for issuing bad checks to customers. Mr. W testified that around December 30th he was informed by several customers that the claimant had given them insufficient funds checks and he reported this to Mr. H. Mr. H said that he called the office manager at the main office and told him about the claimant having given more bad checks to customers and that the office manager told him "our company

would not tolerate our salesmen giving insufficient funds checks to our customers." When the claimant returned to work on January 4, 1993, Mr. H testified that he told the claimant what the office manager had said and then terminated the claimant because the claimant had given insufficient funds checks to customers. The claimant testified that he had issued more bad checks to customers in order to come up with bail money for a relative that was in jail. Mr. W was at the January 4, 1993, meeting with the claimant and he said that the reason the claimant was terminated was because the claimant had given insufficient funds checks to customers. Mr. W said that the claimant had been warned before about giving bad checks to customers and that the claimant was told that it was "bad business" to do so and was asked "not to do that." Mr. W said he didn't recall if the claimant was told he would be terminated if he wrote bad checks to customers again. Although the claimant did not directly testify that he was terminated for issuing bad checks to his route customers, his testimony indicates that he recognized that that was the reason given by Mr. H for his termination on January 4, 1993. He said that he told Mr. H when he was terminated that "insufficient funds checks have nothing to do with me being at work."

The hearing officer found that after (date of injury), the claimant issued several personal checks to various business which were returned due to insufficient funds; that the personal checks issued by the claimant were for personal reasons not related to the claimant's employment with the employer; that the employer terminated the claimant on January 4, 1993, because of the insufficient funds checks; and that the employer never told the claimant prior to January 4, 1993, that he would be terminated for writing checks for personal reasons which were returned due to insufficient funds. While these findings are supported by sufficient evidence, they fail to take into account the critical fact that the undisputed testimony showed that the claimant was issuing bad checks to customers on his route. The findings also fail to take into account that the claimant had been told by the employer several weeks before his termination that such conduct was "bad" in that it could affect his ability to sell beverages to the customers he wrote bad checks to, and that the claimant ignored the employer's counseling effort by again issuing bad checks to customers. Common sense dictates that a salesman such as the claimant stands a better chance of selling his employer's product if he has a good business relationship with the customers on his route and that issuing bad checks to those customers has the potential for undermining that relationship and the trust upon which it is founded. The employer recognized this to be the situation and communicated as much to the claimant the first time he was counseled about writing bad checks to customers. We are not aware of any law that would require the employer in this case, a private beverage company, to spell out to the claimant that repeated instances of issuing bad checks to customers would result in termination prior to terminating the claimant for such conduct. It may be that some special employment relationships would require such a warning, but no such special employment relationship has been shown in this case. Furthermore, no evidence was adduced that the employer had a policy which required a warning to the employee before being terminated for misconduct. In any event, the employer had cautioned the claimant about his behavior and

the way in which such behavior would look to his customers several weeks before firing the claimant when he repeated the conduct he had been cautioned about. In sum, we hold that in view of the undisputed evidence concerning the issuance of bad checks by the claimant to customers of the employer and the claimant's termination because of such conduct after having been counseled about it, the hearing officer's findings of fact do not support his conclusion of law that the "claimant was not terminated for cause by the employer." We hold that the great weight and preponderance of the evidence establishes that the claimant was terminated for just cause by the employer.

The remaining issue to be considered is whether the claimant has had disability. "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). An employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits. Article 8308-4.23(a). The fact that we have determined that the claimant was terminated for just cause does not end the inquiry into whether the claimant has disability. In Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, we stated that: "If and when an injured employee, who is terminated for cause, can sufficiently establish that the work-related injury is precluding him or her from obtaining and retaining new employment at preinjury wage levels, temporary income benefits once again become payable." In Texas Workers' Compensation Commission Appeal No. 92016, decided February 28, 1992, we stated that: "Involuntary termination that is based on good cause can be a factor, along with the continuing effect of the injury on the ability to obtain and retain employment, in considering whether temporary income benefits are due." Moreover, in Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992, we wrote: "We note that while the reason for termination may be a factor to evaluate, the focus of an inquiry as to disability is on the inability to `obtain and retain' employment at equivalent wages. In this regard, the fact that a termination may have been for cause does not, in and of itself, foreclose the existence of disability."

In the instant case, the hearing officer found that at the time the claimant was terminated by the employer, he had the ability to obtain and retain employment at wages equivalent to his preinjury wage, but further found that on and after January 11, 1993, and continuing through the date of the hearing, the claimant did not have the ability to obtain and retain employment at wages equivalent to his preinjury wages, and that on January 11, 1993, the claimant was placed on light duty work with no lifting due to his injury of (date of injury). The hearing officer concluded that the claimant had disability on and after January 11, 1993, and through the date of the hearing. Having reviewed the record, we conclude that the hearing officer's determination of disability on and after January 11, 1993, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to clearly wrong and manifestly unjust. The determination of disability is supported by the claimant's testimony concerning his inability to work due to his injury and by reports of his health care providers who, on and after January 11, 1993, did not return

the claimant to full duty work, but only to limited work with restrictions of no lifting, and thereafter, no driving. Moreover, one doctor did not even indicate that the claimant could return to limited duty work when he noted that the claimant was not released to full duty work. Furthermore, the evidence shows that the claimant is in need of surgery for his umbilical hernia, which could well contribute to his inability to work. We have previously observed that disability is not necessarily a continuing status only, and that a claimant may have disability recur after a period of no disability. *See* Texas Workers' Compensation Commission Appeal No. 91053, decided December 5, 1991. In addition, in Texas Workers' Compensation Commission Appeal No. 92277, decided August 5, 1992, we observed that a conditional medical release (limited duty) did not end disability unless the employee was thereafter able to obtain and retain work paying a wage equal to the preinjury wage. *See also* Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992, where we affirmed a finding of disability for a period after the injured employee had been terminated for cause and was released only to light duty work.

We do not find the two Appeals Panel decisions cited by the carrier to be controlling on the issue of disability in this case for the reason that they are factually dissimilar. Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993, held that the employee's disability ceased when he was incarcerated in prison under a 60-year sentence. Incarceration is not involved in the case under consideration. Texas Workers' Compensation Commission Appeal No. 91098, decided January 15, 1992, affirmed the hearing officer's decision that the employee did not have disability after he quit his job because the evidence in that case was sufficient to support the hearing officer's determination that the employee's injury did not keep the employee from working. In the instant case, there is sufficient evidence to support a determination that, notwithstanding termination for just cause, the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage was because of his compensable injury on and after January 11, 1993.

We affirm those portions of the hearing officer's decision which determine that the claimant sustained a compensable injury on (date of injury), and has had disability on and after January 11, 1993. We reverse the hearing officer's conclusion of law that the claimant was not terminated for cause and render a decision that the claimant was terminated for just cause; however, our reversal of the hearing officer's determination concerning the termination for cause issue does not affect the hearing officer's award of benefits to the claimant given our affirmance of the determinations on compensable injury and disability.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge